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Essay

A SIGNALING THEORY OF HUMAN RIGHTS COMPLIANCE

David H. Moore*

INTRODUCTION

For years international law scholarship generally assumed that nations tend to comply with international law.¹ As Louis Henkin famously phrased it, “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”² Of course, the truth is that noncompliance is common. Sadly, the assumption of compliance may be farthest from the truth in the realm of international human rights. Despite the dramatic increase in the number of human rights instruments since World War II, noncompliance remains prevalent.³ Recognizing, perhaps, the degree of noncompliance that exists in international law generally, scholars in recent years have begun to focus on what motivates nations to comply with or deviate from international law.⁴

Many theories have been advanced to explain compliance. Abram and Antonia Handler Chayes have argued that treaty compliance results largely from a “propensity to comply,” which in turn derives from efficiencies achieved by avoiding case-by-case decisionmaking, the fact that treaties are negotiated to reflect the parties’ interests, and the norm that treaties create law which states presumptively should obey.⁵ According to the Chayeses, treaty compliance also derives from the need to maintain one’s status within a highly interrelated community of states.⁶ Addressing compliance with

* John M. Olin Fellow in Law, University of Chicago Law School. I am grateful to Douglas Baird, Douglass Cassel, Cole Durham, Richard Epstein, Daniel Farber, Eric Posner, David Weissbrodt, and especially Jack Goldsmith for their helpful suggestions regarding this Essay.

¹ See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1826 (2002); Oona A. Hathaway, *Do Treaties Make a Difference? Human Rights Treaties and the Problem of Compliance*, 111 YALE L.J. 1935, 1937 (2002). International relations scholarship, for its part, largely ignored international law. *Id.* at 1942–43; Guzman, *supra*, at 1826–27.

² LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

³ See Hathaway, *supra* note 1, at 1940, 1978, 1981, 1987, 1999, 2021.

⁴ See *id.* at 1937 & n.2, 1939, 1942–43; Guzman, *supra* note 1, at 1826–27.

⁵ ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 3–9 (1995).

⁶ *Id.* at 27–28.

customary international law from a rational choice perspective, Jack Goldsmith and Eric Posner have rejected the notion that nations feel a sense of obligation to obey international law and have treated compliance as an epiphenomenal result of the convergence of a nation's interests with the tenets of that law.⁷ Defending the influence of international law, Harold Koh has argued that nations comply with international law as a result of repeated participation in transnational legal interactions with state and non-state actors which leads to internalization of international norms and the formation of national identity around those norms.⁸ Likewise recognizing the importance of non-state actors, liberal theorists like Ann-Marie Slaughter have focused on the impact that individuals and groups exert on state behaviors through domestic political institutions.⁹ Still other approaches exist.¹⁰

None of these approaches, however, offers a comprehensive description of compliance with international law in general or human rights law in particular. To name some of the more apparent shortcomings, the Chayes's managerial model assumes a tendency to comply rather than explaining compliance.¹¹ Rational choice theory has not provided a comprehensive explanation of why a nation would find it in its self-interest to conform to human rights norms when it is not compelled to do so by domestic influences and is not coerced¹² into doing so by other states.¹³

⁷ Goldsmith and Posner claim that the very thing we term customary international law is actually patterns of behavior resulting from the pursuit of self-interest under four behavioral logics: coincidence of interest, coercion, cooperation, and coordination. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1114-15 (1999) [hereinafter Goldsmith & Posner I]; Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 640-41, 654-59 (2000) [hereinafter Goldsmith & Posner II].

⁸ Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 203-05 (1996) ("[A]s nations participate in transnational legal process, through a complex combination of rational self-interest, transnational interaction, norm-internalization, and identity-formation, international law becomes a factor driving their international relations.").

⁹ See Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 TRANSNAT'L. L. & CONTEMP. PROBS. 377, 397-400 (1994).

¹⁰ For a more extensive review of international law and international relations theories on compliance, see Hathaway, *supra* note 1, at 1944-62; Guzman, *supra* note 1, at 1830-40.

¹¹ See Guzman, *supra* note 1, at 1832.

¹² Goldsmith & Posner II, *supra* note 7, at 668 (stating that coercion accounts for some conformance with human rights, but not much, as "nations are not generally inclined to expend military and economic resources to prevent another nation from abusing its citizens"). But cf. Stephen D. Krasner, *Sovereignty, Regimes, and Human Rights*, in REGIME THEORY AND INTERNATIONAL RELATIONS 139, 140-41, 143-44, 166 (Volker Rittberger ed., 1993) (arguing that "[t]he question of whether states adhere to [human rights] regimes is not a function of the extent to which a regime enhances information and discourages cheating by other actors; rather it is a function of the extent to which more powerful states in the system are willing to enforce the principles and norms of the regime").

¹³ See Koh, *supra* note 8, at 201 (noting that "rationalistic, state-centered theories work far less well . . . in such areas as human rights").

Transnational legal process theory fails to explain how human rights principles become internalized domestically.¹⁴ Finally, liberal theory has been called into question by recent empirical work, finding among other things that “ratification of treaties on the whole, and of regional treaties in particular, often appears to be associated with worse human rights practices than would otherwise be expected” and that “fully democratic nations have worse torture ratings when they ratify the Torture Convention than would otherwise be expected.”¹⁵

Clearly, no one theory has a corner on the explanation for compliance. In fact, all share a common failing. Each fails to take adequate note of a significant dynamic that affects human rights compliance: signaling.¹⁶ This Essay corrects that failing by developing a signaling theory of human rights compliance. Like the theories developed to date, signaling theory does not explain human rights compliance in its entirety. Indeed, it does not purport to do so. Instead, signaling theory supplements the rational choice perspective on compliance,¹⁷ helping to explain that puzzling

¹⁴ See Guzman, *supra* note 1, at 1835–36. The theory suggests that a nation might internalize international norms in order to avoid the disruption that violation of norms causes in its ability to participate in the transnational legal process. See Koh, *supra* note 8, at 206–07. In essence, this is an argument that the gains from cooperation inspire nations to comply with international law. Transnational legal process, in this regard, adds little to the rational choice perspective, besides reliance on the unexplained process of internalization. For another attempt to explain internalization of norms, see Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 51 INT’L ORG. 887, 902–05 (1998).

¹⁵ Hathaway, *supra* note 1, at 2001–02 & n.215; see also *id.* at 1988 (“[L]iberal theory is unable to explain why full democracies with the best [human rights] ratings have lower ratification rates [for human rights treaties] than those with slightly worse ratings.”). Other empirical findings were consistent with liberal theory. See *id.* at 1987–88, 2001, 2019.

¹⁶ The idea of human rights protection as a form of signaling has largely been neglected by legal scholars. The most comprehensive development of the idea to date has been undertaken by Daniel Farber, who argues that protection of human rights through constitutionalism and an independent judiciary is a signal to investors of a state’s commitment to and capacity for economic liberalization. Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 84–93 (2002); see also Hathaway, *supra* note 1, at 2012–13. This Essay attempts to develop a broader theoretical understanding of the signaling dynamic in the human rights arena.

¹⁷ More specifically, signaling theory might be considered a refinement of reputational theories of international law compliance. See Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625, 674–75 (2001) (reviewing ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000)); POSNER, *supra*, at 46 (signaling is a behavioral logic supporting a reputational theory). Reputational theories generally assert that rational nations may adhere to their commitments in order to establish reputations for compliance, which increase opportunities for cooperation. See, e.g., Guzman, *supra* note 1, at 1845–50. Signaling theory explains that affirmative costly acts that can distinguish more cooperative nations from less cooperative ones may be used to strengthen a reputation for cooperativeness. Signaling theory thus helps to explain why nations might engage in affirmative acts consistent with human rights principles rather than simply avoid visible noncompliance. Likewise, signaling theory provides a more plausible explanation for compliance in situations where compliance would not directly affect another nation, as is generally the case with human rights. Finally, signaling theory helps to explain why noncostly compliance (e.g., compliance compelled by domestic audiences) may not improve a country’s reputation for coopera-

swath of compliance that occurs when a nation neither faces effective domestic pressure nor direct pressure from other states to comply.¹⁸ Signaling theory thus makes a significant contribution to compliance theory while yielding important insights for the protection of rights around the world.

The Essay proceeds as follows. Part I outlines the basics of signaling theory in the human rights context, explaining why and how human rights compliance acts as a signal. Part II deals with influences that can alter the basic dynamics of signaling. Part III examines the conditions under which signaling is likely to have its most significant impact on human rights compliance. Part IV identifies insights that signaling theory sheds on international human rights law and compliance, while Part V continues to explore those insights, focusing on the lessons signaling theory provides for improving human rights protection. Throughout, this Essay offers brief anecdotes illustrating concepts discussed. Sophisticated empirical research would be required to rigorously test the assertions made.¹⁹ This Essay leaves that project for another day in order to focus on the theoretical understanding of compliance as signaling.

I. THE BASICS OF SIGNALING THEORY

A signal is a costly behavior that can communicate information about the sender when the receiver knows that only senders with a particular characteristic can afford, or are willing, to send the signal.²⁰ Signals function in

tiveness. Cf. Guzman, *supra* note 1, at 1846–48 (acknowledging that compliance may be motivated by reputational concerns or some independent interest, but failing to address whether compliance due to an independent interest bears on reputation).

¹⁸ Nor does signaling theory attempt to explain mere inaction that might be termed compliance. A nation might refrain from committing human rights abuses because it lacks any incentive to do otherwise. For example, according to Goldsmith and Posner, nations may refrain from committing crimes against humanity because “[it] is unattractive and costly to kill people, it disrupts society and the economy, and often there are simply no real animosities among citizens, and thus nothing to be gained from crimes against humanity.” Goldsmith & Posner II, *supra* note 7, at 668. Similarly, a nation may refrain from arbitrarily arresting all its citizens because it lacks incentive to do so, even if it arrests some. Some inaction consistent with human rights principles thus occurs regardless of other actors or pressures. See *id.* at 655–57, 672. This type of inaction is not explained by the signaling model.

¹⁹ Indeed, the difficulty of rigorously testing signaling theory is a significant limitation. See McAdams, *supra* note 17, at 640–42, 688.

²⁰ See POSNER, *supra* note 17, at 19, 22; James D. Morrow, *The Strategic Setting of Choices: Signaling, Commitment, and Negotiation in International Politics*, in STRATEGIC CHOICE AND INTERNATIONAL RELATIONS 88 (David A. Lake & Robert Powell eds., 1999); A. MICHAEL SPENCE, MARKET SIGNALING: INFORMATIONAL TRANSFER IN HIRING AND RELATED SCREENING PROCESSES 107 (1974) (explaining that signals communicate information otherwise unavailable to the receiver when an alterable attribute of the signaler is unobservable but influences “the way the receiver would prefer to reward or respond to the signaler,” and “the costs of signaling [are] . . . negatively correlated with the unobservable attribute which the receiver values”). James Morrow refers to this brand of signaling as costly signaling, while arguing that different types can sometimes be distinguished through costless sig-

environments in which the receiver cannot directly observe the information relayed by the signal. Signaling is effective when both senders and receivers understand that a particular action is a signal.

To illustrate with a familiar example, consider education as a signal of employee productivity.²¹ Employers cannot directly observe how productive job applicants will be if hired. However, obtaining an education costs money, time, and effort. Arguably, these costs are negatively correlated with productivity—that is, persons with higher productivity find obtaining an education to be less costly. As a result, an employer who seeks highly productive employees can estimate productivity based on the educational attainment of the applicant. Highly productive applicants thus have an incentive to obtain an education and to excel in doing so to signal their type.

Just as educational attainment may serve as a signal for employers, compliance with international human rights principles may serve as a signal to other nations. Compliance, as used in this Essay, refers to behavior consistent with international human rights principles. The behavior need not arise out of a sense of legal obligation nor be based on an international instrument that purports to impose such an obligation.²² Instead, compliance may be motivated by the dynamics of signaling, and signaling, as discussed below, may be aided by, but does not require, the creation of international instruments.²³

Conformity with human rights principles can serve as a signal, in part, because it is costly.²⁴ Respecting human rights may, for example, require

nals, such as international resolutions, that help coordinate action. Morrow, *supra*, at 88–90. Others refer to costless communication that facilitates coordination as cheap talk. See Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUDS. 115, 125–29 (2002) [hereinafter Goldsmith & Posner III]. Because I deal with the costly behavior of compliance, I need not decide which label is more appropriate for costless communication. Moreover, this Essay need not address the extent to which costless acts may also influence other nations.

²¹ The example of education as a signal of productivity in the market for jobs is drawn from signaling pioneer and Nobel laureate A. Michael Spence. See SPENCE, *supra* note 20, at 14–30. But cf. Edward Rock & Michael Wachter, *Meeting by Signals, Playing by Norms: Complementary Accounts of Nonlegal Cooperation in Institutions*, 36 U. RICH. L. REV. 423, 426 (2002) (noting, alternatively, that education may be a cause, not a signal, of higher productivity).

²² Compare Goldsmith & Posner I, *supra* note 7, at 1115 (theorizing that “[s]tates do not comply with [customary international law] because of a sense of moral or legal obligation”), with RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

²³ See *infra* text accompanying notes 108–11.

²⁴ See Farber, *supra* note 16, at 84, 89, 92–93, 98; STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 15–16, 20–24 (1999); Richard A. Posner, *Creating a Legal Framework for Economic Development*, WORLD BANK RES. OBSERVER, Feb. 1998, at 1, 9; cf. Goldsmith & Posner III, *supra* note 20, at 122–23.

The costly nature of signals distinguishes the signaling theory developed in this Essay from

the creation of an independent judiciary, with its attendant monetary cost and risk of decisions unfavorable to the political arm of government.²⁵ In the United States, respecting the rights of criminal defendants has meant excluding evidence obtained through unconstitutional searches. Similarly, respecting property rights has entailed compensating those whose property is taken through the power of eminent domain. In any nation, safeguarding rights imposes costs.

Of course, failing to safeguard rights may also be costly. A study evaluating 155 nations with market economies between 1960 and 1980 found that economic "[g]rowth rates in societies that circumscribe or proscribe political, civil, and economic liberty are only 40 to 56 percent (depending upon the attribute) of those in societies in which individual rights are protected."²⁶ "[T]he average growth rate in societies where these freedoms are restricted is one-third of that of free societies," amounting to "a 67 percent tax on the wealth of the citizens of such states."²⁷ These costs, however, differ from the costs inherent in signaling. Signaling imposes the opportunity or component costs of engaging in the signaling behavior itself. An actor's ability and willingness to incur the costs of signaling behavior can communicate something about the actor. In contrast, the economic stagnation uncovered by the study is not endogenous to the act of violating rights, but rather is the consequence or correlate of that behavior, and thus tells us something about the behavior rather than something about the actor.

More concretely, incurring the costs of human rights compliance demonstrates that a nation is able and willing to restrain the reach and exercise of its power in the near term. By contrast, the drag on economic growth that follows violation of human rights merely reveals that such a violation causes or correlates with economic stagnation. Of course, the distinction fades to the extent an actor knows *ex ante* the consequences or correlate of

Robert Jervis's theory of signals and indices. In Jervis's theory, signals are words or actions that are intended to influence perceptions and that can be sent by deceptive nations as easily as by honest ones. ROBERT JERVIS, *THE LOGIC OF IMAGES IN INTERNATIONAL RELATIONS* 18, 21, 66 (1970). Nations should therefore discount Jervis's brand of signals. *See id.* at 23, 67. Indices, in Jervis's theory, are words or actions that are believed to be beyond an actor's ability to manipulate for the purpose of projecting an image. *Id.* at 18, 28. By contrast, in the theory developed here, nations know that signals may be used to influence perceptions, but they trust them to the extent that the cost structure of the signals distinguishes among nations (i.e., produces a separating equilibrium). The signaling theory in this Essay thus describes behavior that conceptually lies somewhere between Jervis's signals and indices.

²⁵ *See* Farber, *supra* note 16, at 93; *see also* Posner, *supra* note 24, at 7 ("[P]olitical authorities will be reluctant to create a corps of truly independent officials who may constitute a rival center of power . . .").

²⁶ GERALD W. SCULLY, *CONSTITUTIONAL ENVIRONMENTS AND ECONOMIC GROWTH* 176 (1992); *see also* Posner, *supra* note 24, at 3 (citing "empirical evidence . . . that the rule of law does contribute to a nation's wealth and its rate of economic growth").

²⁷ SCULLY, *supra* note 26, at 179.

an action. In that case, the difference between the costs of signaling behavior and the costs of the behavior's consequences is a difference in timing. The costs of engaging in signaling behavior are immediate.²⁸ The costs resulting from correlative or consequential phenomena typically are delayed. Even when the difference is a difference in timing, however, the willingness to engage in the signaling behavior can communicate something about the actor.

Returning to the example of human rights, respecting human rights tends to impose immediate costs—restraints on government power or the costs of providing opportunities. Violating human rights provides, from the government's perspective, the immediate benefits of unrestrained action, while risking future costs, such as stunted economic growth. Complying with human rights thus demonstrates a willingness to restrain present use of power for long-term benefits, while violating human rights preserves the full range of government power in the present at the expense of future gains.

As a result of inherent costs or differences in timing, complying with human rights can signal a nation's willingness to restrain the exercise of power in the near term.²⁹ The concept of restraint is expressed in terms of discount rate in this Essay.³⁰ A nation with a low discount rate is one that is willing to restrain itself in the near term, as demonstrated by its compliance with human rights. A nation with a high discount rate rejects restraints on its exercise of power, disregarding human rights.³¹

²⁸ See Farber, *supra* note 16, at 86.

²⁹ See *id.* at 98; cf. Guzman, *supra* note 1, at 1884 (arguing "that violations of international law impose a reputational cost because they have a negative impact on other countries' perception of a state's willingness to accept short-term costs in order to protect long-term relationships and trust").

³⁰ A nation's discount rate describes the present value the nation places on a future benefit. A nation with a low discount rate, say 20 percent, discounts a future benefit of 10 by 20 percent and places a present value of 8 on the future benefit. A nation with a high discount rate of say 70 percent sees the same future benefit of 10 as being worth 3 at present. Accordingly, if these nations must decide whether to defect for a present gain of 5 or cooperate for a future benefit of 10, the low-discount state will cooperate to obtain 8 while the high-discount state will defect to obtain 5.

For a critique of the signaling model's reliance on discount rate, see Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms*, 36 U. RICH. L. REV. 367, 374–75 (2002). For a defense of the same, see Eric A. Posner, *The Signaling Models of Social Norms: Further Thoughts*, 36 U. RICH. L. REV. 465, 476 (2002).

What lies behind a nation's discount rate or level of restraint is a complex question that requires additional study. At a minimum, political and economic stability, judicial independence, or non-arbitrary decisionmaking may be component parts.

³¹ In this Essay, I employ the simplifying assumption of a unitary discount rate for each country. Cf. Goldsmith & Posner II, *supra* note 7, at 476 (defending use of a single discount rate as "a useful simplification for expository purposes"); Harold L. Cole & Patrick J. Kehoe, *Models of Sovereign Debt: Partial Versus General Reputations*, 39 INT'L ECON. REV. 55 (1998) (employing a general reputation model to support the existence of sovereign debt). However, a more nuanced explanation might posit that nations have multiple discount rates, each in a different plane of interaction. See W. Bradley Wendel, *Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of*

Nations interested in long-term cooperation have an incentive to identify low-discount states. These nations are more likely to exercise restraint and forego immediate gains from defection for the long-term benefits of cooperation.³² All things being equal, then, nations looking to obtain the benefits of long-term cooperation, whether economic or otherwise, will prefer to engage nations with low discount rates.³³ Low-discount states thus have an incentive to send human rights signals to attract cooperative opportunities.³⁴

To illustrate with a simplified example, suppose a South American nation has agricultural products that it could export. If the nation is known to arbitrarily arrest citizens who speak out against the regime, the nation will be perceived as having a relatively high discount rate. Because of this rate, a Western European nation wishing to secure a long-term source of the products would be less likely to enlist the South American nation than a nation that has a lower discount rate, all other concerns being equal.³⁵ If, on the other hand, the South American nation does not engage in arbitrary detention and allows citizens who are so detained to recover against the government,³⁶ it incurs immediate costs in the process and signals that it has a lower discount rate. The Western European country would be more likely to cooperate with the signaling South American nation. The South American nation thus has incentive to signal.

Whether the South American nation, or any nation, will actually send

Explanation, 77 IND. L.J. 1, 38–39 (2002); Russell Hardin, *Law and Social Norms in the Large*, 86 VA. L. REV. 1821, 1821–28 (2000); George W. Downs & Michael A. Jones, *Reputation, Compliance and International Law*, 31 J. LEGAL STUD. 95, 97, 100–09 (2002). In such a theory, the information communicated by a nation's human rights record would nonetheless be relevant over a variety of planes to the extent a nation's human rights practices are not influenced by direct domestic or foreign benefits or sanctions and thus indicate how a nation will act in the absence of such direct incentives. *But cf.* Downs & Jones, *supra*, at 107 n.33, 112.

³² Such nations are also better candidates for more sophisticated agreements. *Cf.* Guzman, *supra* note 1, at 1855.

³³ *Cf. id.* at 1850 (States that do not develop a reputation for compliance “choose short-term benefits over long-term gains . . . are more likely to ignore international commitments and, as a result, are less likely to find partners willing to rely on such commitments.”)

³⁴ See JERVIS, *supra* note 24, at 7 (recognizing that obtaining an image as a cooperator can facilitate cooperation with other nations); Guzman, *supra* note 1, at 1849 (recognizing that “[a] country that develops a reputation for compliance with international obligations signals to other countries that it is cooperative” and is thereby able “to enjoy long-term relationships with other cooperative states”); Goldsmith & Posner III, *supra* note 20, at 122 (explaining that a low-discount (i.e., politically stable) nation “wants other nations to know that it has a low discount rate, for that would make it an attractive partner in . . . cooperative relationships,” and will therefore try to distinguish itself by sending “signals that [high-discount] nations are unable to afford”).

³⁵ There may be situations where nations seek short-term exploitation rather than long-term cooperation and therefore care less about the discount rate of the nation to be exploited.

³⁶ See International Covenant on Civil and Political Rights, art. 9, *opened for signature* Dec. 16, 1966, 99 U.N.T.S. 171 (prohibiting arbitrary detention or arrest and mandating “an enforceable right to compensation” for violations).

human rights signals depends on the costs of signaling and the gains signaling will secure.³⁷ The outcome of this cost-benefit analysis also depends on the nation's discount rate. Nations with low discount rates are able to send the signal more cheaply in the present period than are nations with high discount rates. As a result, nations with low discount rates generally have greater incentive to signal.

The basic incentives behind the decision to signal can be captured in a theoretic game of imperfect information, as modeled in Figure 1.³⁸ The game also captures the incentives of the state deciding whether to cooperate with a nation that has or has not signaled. The game begins at the circle in the center, where a hypothetical force labeled "Nature" determines whether Player 1, the state deciding whether to signal, has a high or low discount rate.³⁹ If Player 1 has a high discount rate, the game proceeds along the top axis; if Player 1 is a low-discount state, the game occurs along the bottom axis. Player 2, the potential partner state, does not know whether Player 1 is high or low discount. As a result, the partner state does not know whether the game is being played along the top or bottom axis.

The partner state begins with an estimate of the probability that the signaling state has a low discount rate. This estimate may be based on the partner state's past interactions with the signaling state, the signaling state's governmental structure, the political party in control of the signaling state, the signaling state's regional affiliation, or a host of other factors that might indicate whether a state is likely to cooperate. In this model, the probability that the signaling state is low discount is assumed to be 0.5.

Once nature has determined whether the signaling state has a high or low discount rate, the signaling state decides whether to protect human rights, in which case the game proceeds to the left, or to violate those rights, in which case the game moves to the right. The decision whether to comply with international human rights is based on a cost-benefit analysis. For states with low discount rates, the cost of complying with human rights is 1. Compliance costs states with high discount rates 2.⁴⁰ The benefit to a state from violating human rights is 1—for example, the state might, through arbitrary detention, uncover criminal activity that it would not otherwise detect.

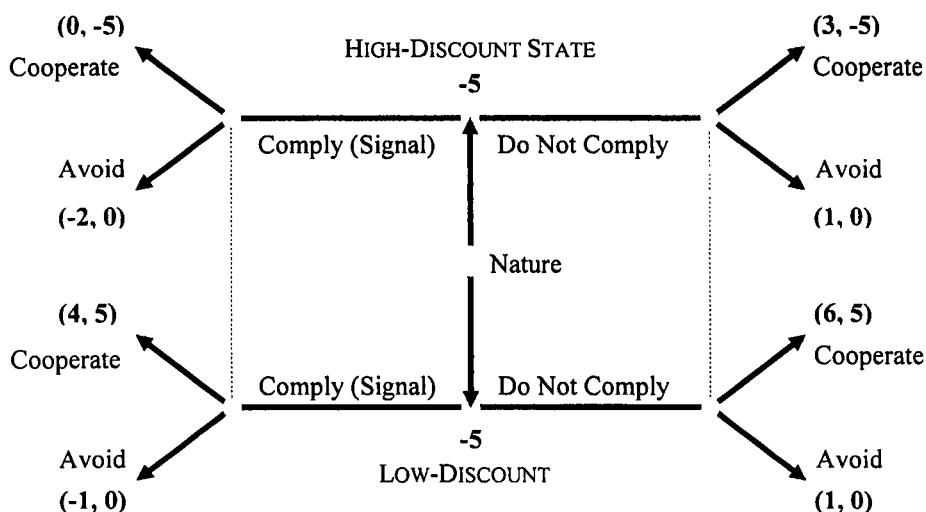
³⁷ Cf. Guzman, *supra* note 1, at 1853.

³⁸ For other explanations of games of imperfect information, see DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 122–58 (1994); In-Koo Cho & David M. Krepps, *Signaling Games and Stable Equilibria*, 102 Q.J. ECON. 179, 183–86 (1987).

³⁹ Nature, a hypothetical, independent force used to designate type in signaling games, could represent the underlying characteristics left unexplored by this Essay that determine a nation's discount rate.

⁴⁰ A signal works when it can be sent by one type more cheaply than by another. See BAIRD ET AL., *supra* note 38, at 124; ROBERT GIBBONS, *GAME THEORY FOR APPLIED ECONOMISTS* 174 (1992). Low-discount states are able to send the compliance signal more cheaply given their restraint or preference for future benefits.

FIGURE 1



After the signaling state has complied with or deviated from human rights principles, the partner state decides whether to cooperate with the signaling state. The partner state's options are reflected in the angled arrows on either side of the game. The benefit from cooperating with a state with a low discount rate is 5. This payoff takes into account not only the benefits of the immediate interaction, but the discounted benefits of the long-term cooperation that results with such a state. The payoff from cooperating with a state with a high discount rate is -5 for the partner state. The high-discount state takes advantage of the partner state in a one-time deal or at some point in an abbreviated sequence of interaction. The partner state thereby loses the investment made in cooperating with the state and potentially the opportunity to cooperate with another state. The high-discount state gains 2 from the interaction.

Given these payoffs, the dominant strategy for high-discount states in this model is to refrain from complying, thereby distinguishing high- and low-discount states. The partner state cooperates with states that signal, believing that low-discount states signal, while high-discount states do not. The model in Figure 1 thus illustrates the cost-benefit analyses that motivate the decisions to signal and to cooperate.

II. ADDITIONAL INFLUENCES THAT AFFECT SIGNALING

In practice, the cost-benefit analyses involved in signaling and cooperating are more complex, taking account of a wider range of inputs than are

reflected in the model.⁴¹ These additional inputs alter the payoffs from signaling and cooperating. For purposes of illustration, I discuss a few of these inputs. An understanding of these inputs illuminates the relative role signaling plays in the decision whether to cooperate and the influences that might increase the incentive to signal.

A. Influences Affecting the Decision To Cooperate

The decision whether to cooperate with a high-discount state may be profoundly affected by any unusual benefits the state has to offer.⁴² As noted in the example of the South American nation, a partner state would prefer to interact with a low-discount state, all things being equal. But all things are not always equal. Sometimes a nation's interests may be served by interacting with a high-discount nation that offers a highly significant benefit or that is such a significant presence that it realistically cannot be ignored.⁴³ If the high-discount state is the lowest priced source of a critical raw material, for example, the payoff from cooperating with the state may be compelling despite the risk of defection. In such a case, the benefit of cooperating with the high-discount state in the model might be positive rather than negative. As a result, the partner state would have an incentive to cooperate with the nonsignaling, high-discount state.

The partner state might first try to pressure the high-discount state into signaling to obtain an assurance of cooperation. But ultimately, the partner state might cooperate irrespective of whether the high-discount state signals. Indeed, the high-discount state might test its own strength by trying to persuade the partner state to engage before any signaling occurs. If the high-discount state is successful, it obtains the benefits of cooperation without the costs of signaling.

The incentive of an unusual payoff accounts for much behavior in the international arena. It underlies, for example, the European Union's history of differential treatment of China and Myanmar. While the E.U. has imposed a variety of sanctions on Myanmar for its human rights abuses, the E.U. has simultaneously pursued increased trade with China in spite of its abuses.⁴⁴ The economic gains offered have provided strong incentives to engage China despite the fact that China has not participated in pervasive or consistent signaling.

⁴¹ See Guzman, *supra* note 1, at 1851–54 & n.116 (acknowledging the contextual nature of the compliance decision).

⁴² See Andrew Kydd, *Trust, Reassurance, and Cooperation*, 54 INT'L ORG. 325, 332–33 (2000) (expressing this concept mathematically).

⁴³ It is possible that once a low-discount state has engaged a nonsignaling state it will find that it is able to maintain cooperation. In such cases, cooperation might continue without signaling. At a minimum, however, the low-discount state will have incentive to extract signals from the high-discount state in order to maintain its low-discount reputation.

⁴⁴ See Elizabeth Shaver Duquette, *Human Rights in the European Union: Internal Versus External Objectives*, 34 CORNELL INT'L L.J. 363, 386–95 (2001).

The draw of unusual incentives likewise explains much of the United States' behavior in the current war on terrorism.⁴⁵ After September 11, 2001, that war became a consuming priority for the United States. The lure of significant military and political gains has led the U.S. to further engage countries that do not participate in widespread signaling.⁴⁶ For example, the U.S. allied itself with Uzbekistan in order to use an Uzbek airbase and airspace in the fight against the Taliban even though Uzbekistan is known for its human rights abuses against Muslims.⁴⁷ Similarly, the U.S. postponed the release of its annual report on religious freedom reportedly because some of the countries criticized in the report were seen as important to the war on terrorism.⁴⁸ Understanding that the decision to engage nonsignaling states occurs within a larger framework of self-interest renders this behavior unsurprising.

It is likewise unsurprising that a nation might wield such extraordinary power that it need not signal in order to attract cooperation.⁴⁹ The United States, for example, need not and does not comply with various signals that are sent in the international human rights arena. Its extensive activity on the world stage provides significant information from which nations can estimate its level of cooperativeness.⁵⁰ In addition, its sheer strength attracts

⁴⁵ For a Cold War example of this phenomenon, see Scott Horton & Randy Sellier, *The Utility of Presidential Certifications of Compliance with United States Human Rights Policy: The Case of El Salvador*, 1982 WIS. L. REV. 825, 834–36, 840–41, 859 (describing the executive branch's willingness to continue aid to El Salvador in spite of terrible human rights violations given the importance of having a pro-American government at that country's helm).

⁴⁶ See Todd S. Purdum, *U.S. Report Criticizes Allies in Antiterror Campaign for Human Rights Abuses*, N.Y. TIMES, Mar. 5, 2002, at A14 (noting that many of the U.S.'s "strategic allies in the war on terror abused human rights in their own countries last year" and suggesting that while the State Department's human rights report criticized such abuses, it appeared to step lightly where U.S. interests in the war on terror were at stake).

⁴⁷ C.J. Chivers, *Alliance with U.S. Spotlights Uzbek Rights Abuses*, N.Y. TIMES, Oct. 30, 2001, at B1, B4.

⁴⁸ Andrea Koppel & Elsie Labott, *U.S. Holds Report Critical of Key Nations*, Oct. 1, 2001, at <http://www.cnn.com/2001/US/10/01/gen.religion.report/index.html> (last visited Feb. 4, 2003).

⁴⁹ Cf. POSNER, *supra* note 17, at 28 ("The tycoon can violate . . . norms simply because other people value dealing with him so much that they will not cut off relations with him even if they do not trust him.").

⁵⁰ This observation raises the question why nations do not, at some point, obtain sufficient information about each other's type and stop signaling. Cf. McAdams, *supra* note 17, at 664–66. Signaling may become less important to the advent of cooperation among states that have developed a long history of cooperation. See Rock & Wachter, *supra* note 21, at 429, 433. Nonetheless, signaling continues to play a role. Signaling assures a long-time partner that a nation remains cooperative. Given the many factors that can alter a nation's type, such as elections or economic reversals, as well as the difficulty of obtaining information about other nations, this reassurance is important, particularly if a relaxed atmosphere of trust between two nations has increased the potential gains from one-time defection. See POSNER, *supra* note 17, at 21; Cole & Kehoe, *supra* note 31, at 57, 67–69 (observing that in their model of general reputation, as long as there is minimal uncertainty about a government's type, reputation plays a key role in sustaining cooperation). A state may also continue to signal, even if signaling is unnecessary to sustain cooperation with a certain state, in order to maintain a broader reputation as a low-

or compels cooperation regardless of the signals it sends. These dynamics contribute to the double standard that the United States maintains and the resulting frustration many nations feel toward the United States.⁵¹

B. Influences Affecting the Decision to Signal

Just as the payoffs of cooperation may lead a nation to cooperate in the absence of signaling, changes in the payoffs from signaling influence whether a nation will participate in signaling behaviors. The payoffs from signaling may be altered by a change in the cost of sending a signal. If signaling costs increase, the signal will likely be sent less frequently.⁵² For example, if one must intervene in another state that has violated human rights to manifest a low discount rate, fewer nations are likely to engage in the signal.⁵³ Those that do intervene manifest a lower discount rate than those that merely comply with human rights at home.

By contrast, if the cost of a signal decreases, states with higher discount rates might find it in their interest to engage in the signaling behavior.⁵⁴ For example, the favorable position on religious freedom taken by Vatican II has rendered it less costly for countries in which Catholicism predominates to provide greater religious freedom.⁵⁵ The resulting respect for religious freedom, however, does not necessarily reflect a lower discount rate as much as a change in the cost of ensuring that freedom. Consequently, states observing the increased freedom need not update their discount rate estimates.

Another phenomenon that may inspire signaling behavior might be termed signal entrepreneurship.⁵⁶ Because the characteristic communicated

discount type and to nourish a signal that it can send with relative ease. See POSNER, *supra* note 17, at 21. Finally, a nation might continue to engage in signaling behaviors as part of an effort to obtain the benefits of signal entrepreneurship. See *infra* notes 56–57 and accompanying text.

⁵¹ See Goldsmith & Posner II, *supra* note 7, at 667, 669; Andrew Moravcsik, *Why Is U.S. Human Rights Policy So Unilateralist?*, in *THE COST OF ACTING ALONE: MULTILATERALISM AND US FOREIGN POLICY* 345, 347–49 (Shepard Forman & Patrick Stewart eds., 2001) (citing geopolitical power as one source of the United States' paradoxical approach toward international human rights); Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775, 776–90, 831 (2001) (detailing ways in which the United States has limited the applicability of international human rights law to itself even as it uses human rights to judge other nations).

⁵² See POSNER, *supra* note 17, at 20.

⁵³ See Hathaway, *supra* note 1, at 2007 (noting that “military intervention and economic sanctions . . . are used relatively infrequently to enforce human rights norms, in no small part because there is little incentive for individual states to take on the burden of engaging in such enforcement activity”).

⁵⁴ See POSNER, *supra* note 17, at 19–20.

⁵⁵ CENTER FOR THE STUDY OF HUMAN RIGHTS, RELIGION AND HUMAN RIGHTS: BASIC DOCUMENTS 209 (Tad Stahnke & J. Paul Martin eds., 1998).

⁵⁶ See POSNER, *supra* note 17, at 29–32 (discussing the dynamics of social norm entrepreneurship), Finnemore & Sikkink, *supra* note 14, at 896–99 (discussing non-state international norm entrepreneurs). Richard McAdams is puzzled by the contradiction that signal entrepreneurs arguably have incentive to promote separating signals, but nonetheless speak as if their signals are universal. McAdams, *supra*

by human rights compliance—restraint—is perceived as positive, states that successfully campaign for behaviors that signal restraint reap a perception of moral authority.⁵⁷ A state that controls the signals that designate low-discount types also obtains a degree of influence over the actions of other states. The nation authoring a signal likewise has the ability to select signals it can send more cheaply and that help it to identify countries that resemble itself. A nation that has established or is working to establish a signal may thus have additional incentives not only to engage in the signaling behavior but to promote the behavior through monitoring or other means.

Similarly, states may have incentive to become signal entrepreneurs through the creation of new signals in order to wrest the gains of signal entrepreneurship from other entrepreneurs. The incentives of signal entrepreneurship may account, in part, for the debate between developed and developing countries over economic and social rights.⁵⁸ Developed Western⁵⁹ countries have promoted a focus on civil and political rights. Arguably, these countries are able to send these signals more cheaply and gain moral authority from their acceptance. Perhaps in an effort to undercut this authority, the developing countries have promoted economic and social rights. Signaling theory illuminates, however, why these economic and social signals have been relatively unsuccessful. Signals identify low-discount types for cooperative endeavors. The gains from cooperation provide the incentive to signal. Developing countries do not, generally speaking, offer the same level of gains from cooperation that developed countries do. As a result, the incentive to adhere to the signals advanced by the developing countries is correspondingly weak. The point to be made here, though, is that the conflict over economic and social rights arguably involves a battle for the benefits of signal entrepreneurship.

While some states battle for the benefits of authoring signals, other states

note 17, at 635–36. This contradiction is more perceived than real. An effective signal not only separates the pool of potential partners, but identifies good types. The signal thus rests on a conception of how potential partners should behave, a notion that applies to all potential partners. In practice, of course, only those partners that are of the good type will engage in the separating signal.

⁵⁷ This reward results, not from the introduction of some exogenous norm, but from the structure of signaling. See McAdams, *supra* note 17, at 684. The reward might be analogized to that obtained by the sponsors of a successful bill in Congress.

⁵⁸ See Krasner, *supra* note 12, at 163–64; HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 238 (2d ed. 2000); ABDULLAH AHMED AN-NA'IM, HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVE 428–29 (1992).

⁵⁹ Economic and social rights were also favored by communist countries during the Cold War, see Harold J. Berman, *United States Policy with Respect to International Human Rights*, 50 EMORY L.J. 769, 769 (2001) (noting that as between the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, the latter “was the favorite of the Soviet Union and its allies” in the 1970s), though these rights were initially promoted by the United States after World War II, see Bruno Simma, *Human Rights*, in THE UNITED NATIONS AT AGE FIFTY: A LEGAL PERSPECTIVE 263, 276 (Christian Tomuschat ed., 1995).

receive payoffs from foregoing signals. These states find it in their interest to ignore or flout signals advanced by nations they oppose.⁶⁰ Leaders of these states may benefit as, for example, their domestic constituencies coalesce behind their willingness to flex their muscle against more powerful or ideologically opposed nations. Flouting of signals, with its attendant costs in antagonism, risk of retaliation, and foregone cooperation, can also serve as a signal of leadership and resolve from the flouting state to sympathetic nations.

Publication of a nation's human rights practices also can change the signaling incentives for a state. As further discussed below, publicity expands the sweep and therefore the benefit of the compliance signal.⁶¹ At the same time, publicity uncovers attempts to mimic signals without fully participating in signaling behaviors and puts pressure on mimicking states to comply more completely if they wish to obtain the benefits of cooperation. Similarly, publicity may increase the pressure on low-discount states that engage nonsignaling states to enforce human rights in order to preserve their reputations as low-discount states.

Finally, the fact that human rights compliance is not the only means by which a country may communicate its discount rate influences whether a country will comply. Just as a job applicant might rely on extracurricular and volunteer activities, in addition to educational attainment, to signal productivity, a nation may communicate its discount rate through a variety of behaviors.⁶² Indeed, within the realm of human rights alone, a nation might signal its type by monitoring the compliance of others, submitting to supranational enforcement mechanisms, or allowing NGOs, such as Amnesty International, access to its territory. Outside the human rights realm, a nation might signal that it intends to cooperate in the future by repaying old debts.⁶³ Or a nation might develop a

⁶⁰ See POSNER, *supra* note 17, at 28–29. Posner acknowledges, in addressing social norms, that the motivations of those who flout signals are not explained by signaling theory, but by Thomas Schelling's commitment model. *Id.* at 29 & n.14 (citing THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* (1960)). However, flouting the signals of one group is itself a costly action and can serve as a signal of type to members of a rival group. See POSNER, *supra* note 17, at 25. Flouting a group's signals communicates that a player has a high discount rate vis-à-vis members of the flouted group, but a low rate as to members of the rival group. The refusal to send certain signals can thus be cast in the language of signaling theory. Nonetheless, as Posner recognizes, signaling theory does not offer a complete explanation of the decision to align with one group over another.

⁶¹ See *infra* note 140 and accompanying text.

⁶² See POSNER, *supra* note 17, at 24–25 (“[S]ignaling theory suggests that . . . [a]ny costly action can be a signal.”); McAdams, *supra* note 17, at 631, 640, 687–88. The fact that there are other ways in which nations can communicate their discount rate may help to explain why human rights compliance is not more prominent. On the other hand, given the historical circumstances that gave rise to modern human rights, one can surmise that human rights signaling is more prominent and global than many potential signaling behaviors. Admittedly, however, the number of channels for conveying a country's discount rate diminishes the impact and complicates the testability of a signaling theory of human rights compliance.

⁶³ See Harold L. Cole et al., *Default, Settlement, and Signaling: Lending Resumption in a Reputational Model of Sovereign Debt*, 36 INT'L ECON. REV. 365, 365–78 (1995) (developing a model of nineteenth-century sovereign debt repayment in which nations that have defaulted in the past settle old debts to signal that they are now stable and intend to repay their future loans).

history of actual cooperation.⁶⁴ A nation that has provided sufficient assurance of its type through other means may feel less need to comply with human rights.⁶⁵ On the other hand, a failure to comply may undermine the effectiveness of the signals a nation does send. Furthermore, human rights compliance is a particularly powerful signal for two reasons.⁶⁶

First, like actions that directly affect other nations, such as debt repayment, respecting human rights imposes costs on the complying nation. However, nations are less likely to attach a sanction to the violation of human rights as they are to actions, like failure to repay, that directly affect them.⁶⁷ Consequently, a nation's compliance with human rights, in the absence of threatened sanctions, provides a unique insight into that nation's discount rate. Second, world history has made human rights compliance a prominent signal. International human rights came of age after World War II.⁶⁸ An imperialistic Germany had drawn the world into war and committed the worst human rights atrocities the twentieth century had seen.⁶⁹ The two evils—international aggression and human rights abuses—were perceived as twin manifestations of a high-discount state. A state willing to abuse the human rights of its own was more likely to engage in opportunistic behavior against other states. Respect for human rights became an obvious signal of a low-discount state. The Cold War served to strengthen the perceived logic. In that conflict, the threat to international stability, in the eyes of the West, came from a nation characterized by totalitarian control

⁶⁴ See POSNER, *supra* note 17, at 20–21.

⁶⁵ Cf. McAdams, *supra* note 17, at 676–78. McAdams argues that signaling through behaviors generated by norm entrepreneurs cannot account for all the social norm observance that occurs, given the fact that an individual can create a reputation for cooperativeness through other, more efficient means: namely, actually being cooperative and engaging in behaviors that naturally distinguish cooperative and uncooperative types even before the behaviors are recognized as signals. *Id.* This criticism is less persuasive when applied in the human rights arena. Arguably, human rights compliance is a natural signal of the cooperative type. See *infra* text accompanying note 129. Moreover, in international relations, where the character and fortunes of nations can change relatively quickly, signaling may play a comparatively larger role than it does in the social norms context. Finally, in spite of globalization, there are likely fewer signals in international relations than there are norms governing the multitude of daily social interactions. Nonetheless, the fact remains that a nation may see less need to comply with human rights if it has adequately communicated its type through other means.

⁶⁶ See Elmer J. Schaefer, *Predicting Defection*, 36 U. RICH. L. REV. 443, 463 (2002) (arguing that the importance of complying with a norm “will vary from norm to norm and from situation to situation”).

⁶⁷ See STEINER & ALSTON, *supra* note 58, at 562; Goldsmith & Posner II, *supra* note 7, at 668. This statement assumes that human rights govern a nation's treatment of its own population. To the extent human rights extend to a nation's treatment of the population of another state, as humanitarian law does, noncompliance may directly affect another state and evoke retaliation.

⁶⁸ See STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 105, 109–10, 125 (1999); Krasner, *supra* note 12, at 165; Goldsmith & Posner II, *supra* note 7, at 672; Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 599, 614–15 (1986).

⁶⁹ See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 20 (3d ed. 1999) (describing how the Holocaust demonstrated the need for international protection of human rights).

over other states and disrespect for human rights.⁷⁰ In light of these two formative periods in world history, human rights has become a prominent signal. As a result, a nation seeking to establish a reputation as low-discount has incentive to engage in some degree of human rights compliance in addition to its other signaling.

As the above discussion illustrates, in addition to the basic costs and incentives of signaling, many other factors may influence whether a state ultimately signals or requires a signal before cooperating. Thus, while signaling theory explains an important dynamic influencing nations' decisions regarding compliance, it does not provide a comprehensive explanation of nations' actions.⁷¹ Signaling decisions take place within the larger framework of a nation's self-interest.

C. Complications in Signaling Theory

Moreover, in practice, the signaling dynamic is complicated by a few considerations that are worthy of note. First, not every act relating to human rights serves as an independent signal. Information on states' human rights practices is hard to obtain.⁷² Official international monitoring is minimal. Reports by states may be skeletal or propagandistic,⁷³ or may not be filed at all.⁷⁴ NGOs can only do so much to gather information.⁷⁵ And unless they gain currency with their domestic constituencies as a result, individual states often lack strong incentives to engage in widespread monitoring. Even if they attempted to do so, they would have a difficult time penetrating other nations to gather information. As a result, nations generally remain unaware of many of the actions other states take with respect to human rights.⁷⁶ Some actions, of course, attract widespread publicity.

⁷⁰ See JERVIS, *supra* note 24, at 34 (noting the American perception "that Communist regimes are apt to follow expansionist foreign policies").

⁷¹ Cf. Farber, *supra* note 16, at 97 (recognizing that even if certain behavior primarily results from motivations besides signaling, the benefits of signaling may influence behavior at the margin).

⁷² Hathaway, *supra* note 1, at 2012.

⁷³ Krasner, *supra* note 12, at 164.

⁷⁴ According to Hathaway, "[t]here are 1203 overdue reports in the human rights treaty system, while only 1613 reports have ever been considered. Seventy-one percent of all state parties to human rights treaties have overdue reports, and 110 states have 5 or more overdue reports." Hathaway, *supra* note 1, at 1960 n.101; see also CHAYES & CHAYES, *supra* note 5, at 23 (recognizing that "compliance with reporting requirements" is "seriously deficient in human rights treaties").

⁷⁵ See Hathaway, *supra* note 1, at 58 & n.188.

⁷⁶ Richard McAdams argues that preference for risk may also influence whether a state is willing to deviate and chance detection. See McAdams, *supra* note 17, at 672. Risk preference makes it difficult to correctly interpret signals that communicate discount rate. *Id.* Arguably, risk preference does not present the same degree of difficulty where compliance, at least in part, signals restraint. Indeed, risk preference may be a component of restraint. The more restrained a state is, the less likely it will be to risk detection.

Regardless whether risk preference is a component of restraint, any detected violation will reflect poorly on a nation's level of restraint. Of course, the degree to which the deviation signals a lack of restraint will vary, at a minimum, with the probability of detection.

These actions may individually serve as signals. Many times, however, human rights signals consist of general perceptions of performance in an area rather than individual actions in individual cases.⁷⁷ Signaling pressures thus inform a nation's practices in a more diffuse sense rather than dictating how a nation acts in each situation affecting human rights.

Second, human rights signals do not send categorical messages. They do not identify whether a nation will always cooperate or always defect in international endeavors.⁷⁸ Rather, they suggest the likelihood that a nation will cooperate by suggesting its discount rate, or level of restraint. The estimate of a nation's discount rate may also be influenced, among other things, by a nation's past conduct, its governmental structure, its regional affiliation, and other modes of signaling.⁷⁹ Nations consider this range of inputs in determining whether to cooperate. The decision whether to cooperate is likewise not categorical, but continuous.⁸⁰ Thus, nations generally determine how far to cooperate or on which issues to cooperate, rather than whether to engage a nation at all.

Third, signaling behaviors do not invariably separate low-discount states from high-discount states.⁸¹ If signaling will secure sufficient benefits or if the cost of a particular signal is low, even high-discount states may find it in their interest to signal.⁸² This mimicry of the low-discount types diminishes the amount of information a partner state can extract from the signaling behavior.⁸³ All other things being equal, the partner state can conclude that countries that do not engage in the behavior have higher discount rates than those that do, but absent variability in the degree of signaling behavior, the partner state cannot easily determine the relative discount rates of those that do participate in the behavior.⁸⁴

Fourth, and relatedly, compliance with human rights principles is less costly for some nations than for others.⁸⁵ A nation's domestic constituency may have a preference for human rights compliance, for example.⁸⁶ When

⁷⁷ Cf. CHAYES & CHAYES, *supra* note 5, at 17 (recognizing that compliance with treaty obligations "is not an on-off phenomenon"); Hathaway, *supra* note 1, at 22 (same).

⁷⁸ See Schaefer, *supra* note 66, at 454 (noting that "[a] willingness to cooperate in one context need not carry over to other contexts").

⁷⁹ See Farber, *supra* note 16, at 96–97; Kydd, *supra* note 42, at 331–32.

⁸⁰ See POSNER, *supra* note 17, at 20.

⁸¹ See *id.* at 19–20.

⁸² See *id.*; Kydd, *supra* note 42, at 339. As one example, observing the prohibition against genocide is relatively costless for most nations. As a result, even high-discount states will likely observe this prohibition. The fact that a nation has not committed genocide thus communicates little about the nation's discount rate.

⁸³ See POSNER, *supra* note 17, at 19–20; Morrow, *supra* note 20, at 87–88, 90.

⁸⁴ See POSNER, *supra* note 17, at 20.

⁸⁵ Cf. *id.* at 21–22.

⁸⁶ See Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 INT'L ORG. 661, 674 (2000). Explanations of domestic preferences are varied. See, e.g., *id.* at 667–70 (discussing domestic political explanations of the preference for international legalization). This Essay need not choose among these explanations, but simply recognizes that preferences exist and influence state behavior. Cf. Guzman, *supra* note 1, at 1841.

the domestic audience demands compliance, the compliance signal is less costly to send. If domestic demands are sufficient to cause the state to engage in signaling behavior, the behavior will not signal type.⁸⁷ If, on the other hand, compliance imposes costs beyond the domestic benefits it achieves, compliance may yet send a signal. By way of analogy, suppose that I am an employer who wishes to hire workers who value their health. I believe that workers who value their health will be sick less often and will be more productive. I take you out to lunch while interviewing you for a job. You might enjoy a hamburger and onion rings, but you have a cholesterol problem and your doctor has advised you to avoid fats and eat green leafy vegetables or risk heart problems. From a medical standpoint, it might be fine if you order a small serving of onion rings. Nonetheless, you order a spinach salad with dressing on the side. You have an independent constraint that inspired your order in part. But ordering spinach salad and no onion rings can still serve as a signal to me that you value your health,⁸⁸ given the fact that your order imposed costs beyond those medically necessary.⁸⁹

Similarly, when nations act consistently with international human rights principles in part because of domestic constraints, they may nonetheless send a signal. Given the ambiguous cost of the action, however, receiving nations may discount the strength of the signal. Thus, while the United States acts consistently with many international human rights principles, other nations may not interpret these actions as indicating a low discount rate as much as a domestic preference or requirement for the actions taken.⁹⁰ By contrast, compliance by nations facing weak domestic pressure for compliance is more likely to be motivated by signaling interests. Any uncertainty about the degree to which behavior is motivated by domestic preference lessens the effectiveness of the signal.⁹¹

While the aggregate nature of signals, the continuous character of cooperation, the existence of partial pooling, and the difference in costliness of signals alter the effectiveness of human rights signals, they do not prevent signaling from playing a role in international human rights compliance.⁹² Recognizing, however, that the decision to signal may be affected

⁸⁷ See McAdams, *supra* note 17, at 651, 671–72; Wendel, *supra* note 31, at 32–34 (exploring the difficulties that may arise when signaling behaviors result from nonsignaling motivations).

⁸⁸ Of course, in order to accurately interpret the signal, I need information regarding your cost structure, information that may not always be available.

⁸⁹ The cost of ordering a spinach salad may also be so small that people who are not health conscious will mimic the behavior of those who are by ordering the spinach in this one-time lunch appointment. If we ate all our meals together for an extended period, the cost of mimicking would increase and the risk of pooling decline.

⁹⁰ Information regarding domestic preferences may nonetheless be valuable to another state.

⁹¹ See POSNER, *supra* note 17, at 21–22, 27; SPENCE, *supra* note 20, at 27, 47–48 & n.6; McAdams, *supra* note 17, at 671–72.

⁹² Admittedly, however, it is difficult to capture empirically the role that signaling actually plays. See *supra* note 19.

by other influences, the question becomes, when is signaling most likely to occur? This question can be broken down into at least three related questions: Along which lines of international interaction is signaling most influential? What types of nations are most likely to signal? What types of nations are most likely to expect signaling before engaging another state? Part III turns to these questions.

III. THE DOMAIN OF HUMAN RIGHTS SIGNALING

International interaction roughly occurs along three planes: military, diplomatic, and economic. Human rights signaling will play its most significant role in fostering economic and diplomatic relations, while playing a less significant role in military interactions.⁹³ Military interactions possess a positive quality that economic and diplomatic relations typically do not. That is, while economic and diplomatic power is generally exerted through withholding, military interests are also advanced through affirmative acts of might. As a result, cooperation plays a more hegemonic role in the economic and diplomatic arenas than in military matters. Because signals facilitate cooperation, signaling will be more prominent in the diplomatic and economic realms.⁹⁴

In addition, military interests, concerned as they are with national security, rank among the most basic interests of sovereign states.⁹⁵ As a result, states will tend to enter relations with other nations in pursuit of these interests, even in the absence of extensive assurances from human rights signaling, particularly as the military interests at stake increase in importance.⁹⁶ Diplomatic and economic interactions, on the other hand, tend to serve interests that are less fundamental. Diplomatic relations maintain the channels of communication between countries. Economic endeavors improve wealth. Both these interests may be critical to security, but they may not be as well. Because these interests are less fundamental, interactions with other nations in these arenas will be more highly influenced by human rights signaling.

Of course, basic diplomatic interactions occur at a very fundamental level as well, facilitating the very existence of international interaction. As a result, signaling also plays a relatively minor role in the establishment of basic diplomacy. However, once diplomatic ties are established, signaling may

⁹³ Cf. Guzman, *supra* note 1, at 1851 (stating reputational theory "predicts that international law will have a greater impact on economic matters than on military and security matters").

⁹⁴ But cf. McAdams, *supra* note 17, at 664-66 (ignoring the fact that the role of cooperation in a given area of international interaction affects the extent of signaling in that area).

⁹⁵ See Guzman, *supra* note 1, at 1874.

⁹⁶ Cf. *id.* at 1874 (finding it unlikely that reputational concerns "will be enough to change a country's course of action from violation to compliance" in critical areas such as national security). Human rights signaling will likely play an increased role in multilateral military relations, where the need for cooperation is greater.

significantly affect the intimacy and tone of those ties. By contrast, signaling can play a relatively significant role in the development of economic relations, which greatly depend on cooperation. The role of signaling in economic relations may decrease in importance, however, once a country has established a reputation of respecting its economic obligations.⁹⁷

Finally, when relations expand beyond bilateral ties in any realm, the role of signaling may also expand. Regional or multilateral compacts, like the E.U., often require greater cooperation, both because of their multilateral character and because they espouse unifying policies. The demand for signaling may increase with this greater need for cooperation. As a result, membership in these organizations may carry an implicit, if not explicit, expectation of signaling.⁹⁸ Of course, the pressure to engage in signaling behavior might be explained by other influences. Members of the compact may have a preference for the behavior. Alternatively, the compact may be attempting to send a unified signal to other nations of the world or to obtain the benefits of signal entrepreneurship by claiming ownership of the signal for the compact. The European Union's demand for human rights compliance as a prerequisite for membership might be explained by one or all of these dynamics.⁹⁹

Having briefly assessed, albeit at a high level of abstraction and generality, the relative role of signaling in the basic arenas of international relations, it remains unanswered the type of nation that is most likely to signal. As explained above, the decision whether to signal occurs in the context of a broader self-interest calculation that takes account of the benefits that may be obtained with and without signaling. If a nation offers a unique benefit, such as large oil reserves, the nation may not need to engage in consistent signaling to attract international cooperation. Such has been the case with Saudi Arabia. Similarly, if a nation is so prominent that it cannot be ignored, it may not have to signal extensively to engage other countries. Thus, China with its vast potential and the United States with its economic and military might need not engage in consistent signaling in order to attract international engagement.

Nations that lack these unique benefits and prominence, by contrast, have greater need to assure potential partners that they will cooperate. As a result, we would expect more signaling from countries like Mexico or Nigeria¹⁰⁰ than from China. Similarly, we might expect signaling from countries

⁹⁷ *But see supra* note 50.

⁹⁸ See Hathaway, *supra* note 1, at 2017–18 (noting the previously implicit and now explicit European Union requirement of human rights compliance).

⁹⁹ Andrew Moravcsik has noted that emerging Western democracies have followed Europe's lead in accepting the jurisdiction of a regional human rights court, suggesting that European efforts at signal entrepreneurship have been successful. Moravcsik, *supra* note 51, at 27.

¹⁰⁰ At least some of Nigeria's signaling has been influenced by the litigative and investigative efforts of an NGO within Nigeria that has increased the publicity of human rights problems. See CHAYES & CHAYES, *supra* note 5, at 253–54.

attempting to secure the gains of signal entrepreneurship. At the other extreme, countries that perceive greater gains from opposing rather than cooperating with certain states that desire signals can be expected to ignore those signals. States like Iraq fall into this category.

Just as the likelihood of signaling is affected by the type of interaction and nation at issue, the likelihood that a potential partner will demand signaling before engaging another country depends on the character and relative positions of the two countries. Countries that cannot walk away from a potential relationship without incurring significant opportunity costs are in a weak position to demand signaling. Germany, for example, would have difficulty requiring signals from Saudi Arabia before purchasing oil if Germany could not satisfy its demands elsewhere without large costs. To state the point more generally, sellers are in a stronger position to demand signaling in a sellers' market, while buyers assume that position in a buyers' market.

Additionally, a partner state is more likely to demand a signal in situations where the past performance of a country has demonstrated a high discount rate. Thus, if a country has a history of serious human rights violations or of defection in cooperative endeavors, a partner state is more likely to require current signaling before engaging that state.¹⁰¹ For example, England would be more likely to require Sudan to engage in human rights signaling before pursuing extensive economic relations than it would be to require the same of Thailand. Similarly, a partner state may expect signaling where a change, such as a change in leadership or policy, has called a nation's character into question.

Finally, developed Western nations appear more likely to require signaling than other countries. Aside from the relative strength of these countries and the preferences of their domestic constituencies, history may explain why these nations appear to rely more heavily on signaling behaviors than other countries. As noted above, international human rights came of age after World War II. While the war reiterated that international stability may be a national concern, the war also placed the West, and particularly the United States, in a position of economic and military strength. Western powers were posed to exert their military influence and to take advantage of economic opportunities in increasingly global markets.¹⁰²

Given their economic and military might and their role in monitoring and promoting international stability, the Western powers had an interest in

¹⁰¹ Cf. Kydd, *supra* note 42, at 340–50 (tracing the series of signals required to convince the West of the Soviet Union's transformation at the end the Cold War); Farber, *supra* note 16, at 95 (noting that "new regimes have the strongest need to signal their future intentions," while a nation like Britain with "several centuries of experience with an independent judiciary and enforcement of contract and property rights. . . . has little need to send any special signal about these conditions").

¹⁰² See, e.g., Ronald A. Cass, *Economics and International Law*, 29 N.Y.U. J. INT'L L. & POL. 473, 478–79 (1997) (presenting statistics regarding the enormous expansion of international trade and foreign direct investment in the years since World War II).

identifying nations that could be trusted both to forego the types of international opportunism that would trigger conflict and to cooperate in joint endeavors. This type of information about the many nations of the world was not readily available, however. Lacking perfect information, nations came to rely on signals, including respect for human rights, that could identify restrained states.¹⁰³

In light of the context in which modern human rights developed, it is unsurprising that many of these rights have a Western character.¹⁰⁴ The Western nations were sellers in a sellers' market and sought signals that in Western eyes would identify the cooperative type.¹⁰⁵ Of course, contemporary human rights are not exclusively Western and have attained a significant degree of international acceptance. Nonetheless, it still appears more likely that a developed Western nation will require human rights signaling in support of cooperation than a developed non-Western nation like Japan would. History provides a plausible account for this tendency.¹⁰⁶

IV. GENERAL INSIGHTS FROM SIGNALING THEORY

Having sketched the dynamics that inform signaling as well as the context in which signaling has its greatest impact, I turn to a few questions in international law that signaling theory helps to answer. At the outset, signaling theory illuminates why human rights instruments are created in the first place. A state need not ratify a human rights treaty in order to signal. A state could communicate its discount rate by engaging in visible human rights protection regardless whether there is a treaty. However, as briefly noted above, signaling requires that both senders and receivers know that the action in question is a signal.¹⁰⁷

To illustrate, suppose that a person travels to a foreign country where

¹⁰³ Cf. Goldsmith & Posner II, *supra* note 7, at 670 (asserting that the powerful nations' interest in promoting stability and security after the world wars led to "an expansion of human rights concerns").

¹⁰⁴ See AN-NA'IM, *supra* note 58, at 428; Krasner, *supra* note 12, at 161, 164–66 (noting that the Western slant of contemporary human rights results from the relative strength of Western nations).

¹⁰⁵ But cf. L. Amede Obiora, *Toward an Auspicious Reconciliation of International and Comparative Law*, 46 AM. J. COMP. L. 669, 673–74 & n.12 (1998).

¹⁰⁶ The historical account of the rise of human rights compliance as a signal is consistent with Goldsmith and Posner's signaling-based explanation for the moral and legal content of international rhetoric. According to that explanation, "the history of international discursive practices reflects shifts in payoffs from coordinating with different nations. When returns from coordination are maximized by dealing with a small number of countries with similar traditions and values, talk will appeal to relatively specific values—religious (Christian), regional (Europe), racial, and so forth." Goldsmith & Posner III, *supra* note 20, at 134; see also *id.* at 139. While much of international rhetoric historically focused on Christian values, then European values, then the values of civilized nations, since the mid-1900s the rhetoric has centered on respect for human rights. *Id.* at 134–35. This new focus complements the theory that since World War II human rights compliance has been used to identify states with which cooperation would be desirable.

¹⁰⁷ See POSNER, *supra* note 17, at 23, 31; Wendel, *supra* note 31, at 35 (noting the ambiguity that results when senders and receivers do not share a common understanding of signaling behaviors).

different social norms, or signals, are used. In the traveler's native society, tipping a server might be unheard of, while giving money to one in need is customary. In the society visited, by contrast, tipping might be expected and giving to those in need an optional sign of beneficence. Unaware of these differences, the traveler provides money to the homeless person on the street, but fails to tip the server. Similarly unaware of the differences in norms, the server perceives the traveler as cheap, while the homeless person sees her as generous. A lack of mutual understanding of what constitutes the signal prevents perception of the traveler's true character.

In order for signals to operate properly then, their content must be well known.¹⁰⁸ States interested in communicating their cooperative character and in identifying low-discount partners have an incentive to clarify the behaviors that will signal this information. Given its ambiguity, mere custom is a relatively ineffective vehicle for this purpose.¹⁰⁹ International instruments—from binding treaties to hortatory resolutions—are more effective. These written documents define the agreed-upon behaviors that will serve as signals, making both signaling and its absence more readily identifiable on the international stage.¹¹⁰ Written documents also help to educate nations about signaling behaviors because the documents are typically created in international conference and can be easily distributed throughout the world. This educational function serves to reduce the problem of the foreign traveler. The increase in human rights instruments since World War II has helped to make human rights compliance a more effective signal.

The question arises, however, why nations would accede to international human rights instruments. The answer lies in the fact that accession, like compliance, can serve as a signal of restraint. Typically, accession to international human rights instruments costs little. Accession may intensify the monitoring and shaming efforts of transnational actors and raise other nations' expectations of compliance with the risk of greater reputational costs if a signatory deviates,¹¹¹ but accession rarely triggers more than minimal monitoring and enforcement by an authoritative organization.¹¹²

¹⁰⁸ Cf. Schaefer, *supra* note 66, at 457–58 (noting difficulties that arise when the content of norms is unclear).

¹⁰⁹ Within the realm of custom, certain behaviors will be more clearly defined as signals than others. Cf. Finnemore & Sikkink, *supra* note 14, at 892 (noting that different international “norms command[] different levels of agreement”).

¹¹⁰ See Guzman, *supra* note 1, at 1840 (suggesting that international institutions, such as international law, “can reduce [both] verification costs . . . [and] the cost of punishing cheaters”); Kahler, *supra* note 86, at 663 (arguing that legalization reduces “the costs of monitoring and lower[s] the bar for enforcement actions”). Written instruments do not, of course, remove all ambiguity, but they go a long way toward eliminating it.

¹¹¹ See Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819, 819, 821 (2000).

¹¹² See, e.g., Hathaway, *supra* note 1, at 2014–15 (detailing that even the additional enforcement mechanisms of the Optional Protocol to the International Covenant on Civil and Political Rights and of Article 21 to the Torture Convention “tend not to be particularly effective” in practice).

On the other hand, the failure to accede risks the cost of being classed with unrestrained states.¹¹³ As a result, both high- and low-discount states pool around accession.¹¹⁴ Accession separates states into two rough pools: (1) ratifying states which may be low-discount, but may also be mimickers and (2) nonratifying states whose discount rates may be fairly low, but whose failure to accede suggests that they at least have higher discount rates than those that both accede and intend to comply.

Over time, the states' actual practices separate them further into four rough categories: acceding and complying states, acceding and noncomplying states, nonacceding and complying states, and nonacceding and noncomplying states. The acceding and complying states have demonstrated the lowest discount rates by both committing to and complying with the treaty provisions. That is, they have demonstrated their restraint not only by agreeing to abide, but by actually abiding by their agreement.

The acceding and noncomplying states as well as the nonacceding and complying states form a middle tier, in which discount rates vary considerably. At one extreme, those states that do not accede but comply demonstrate a relatively low discount rate, qualified by deliberate retention of the right to deviate from treaty principles. The United States often finds itself in this category with regard to human rights treaties, as it acts consistently with many treaty principles, but refuses to be bound by them through unqualified accession.¹¹⁵ At the other extreme are states that accede but do not comply. These states recognize the value of a perception of compliance and find that ratification buys them the significant benefit of not being as readily identified as deviant. However, their accession provides less cover once their noncompliance becomes apparent.¹¹⁶

In the last category are nations that disregard even the perception of acceding to the instrument. These states are analogous to a foreign traveler who learns of his host society's norms and publicly rejects them, in principle and in practice. These states value maintenance of their full range of power and, as discussed below, may benefit by demonstrating opposition to mainstream signals. The decision whether to accede helps to distinguish these four groups, even though alone it does little to separate them. That is, accession acts as a signal, but standing alone is able to communicate very

¹¹³ See POSNER, *supra* note 17, at 190–91. The risk of being grouped with the unrestrained states through nonaccession is greatest for smaller states that lack the ability to widely publicize and defend their potential reasons for nonaccession. As a result, less prominent states are likely to feel greater pressure to accede to avoid negative characterization.

¹¹⁴ The costs of accession and the separation achieved by the accession signal could be increased by requiring "countries to demonstrate compliance with certain human rights standards before" allowing them "to join a human rights treaty." Hathaway, *supra* note 1, at 2024.

¹¹⁵ See Goldsmith & Posner III, *supra* note 20, at 117–18 (noting that "[t]he United States has signed and ratified many human rights treaties with conditions or reservations . . . that narrow the treaties' obligations to rights already guaranteed by domestic law").

¹¹⁶ See POSNER, *supra* note 17, at 191–92; McAdams, *supra* note 17, at 659.

little information because of extensive pooling.

Signaling theory not only casts light on the decision to accede, but helps to explain recent empirical findings regarding compliance following accession. After an extensive statistical analysis of compliance with various human rights treaties, Oona Hathaway found “that ratification of regional human rights treaties is not infrequently associated with worse than expected human rights practices.”¹¹⁷ Hathaway attempts to explain this counterintuitive finding based on the expressive role of treaties. She argues that because treaty ratification allows a country to express its support, whether sincere or not, for the principles embodied in the treaty, ratification diffuses pressure on the country to actually comply with the treaty.¹¹⁸ She suggests that “[r]atification of regional human rights treaties may be more often and more markedly associated with worse human rights [practices] than is ratification of universal human rights treaties because regional” dependencies create greater incentive to accede to a regional treaty even if a country does not yet conform, or intend to conform, to the principles in the treaty.¹¹⁹

Hathaway’s theory provides a possible explanation for why a state would ratify a regional treaty, but offers little explanation for why the state would then engage in worse practices over any substantial period of time. If states in a region exert such pressure toward compliance, presumably the smokescreen of ratification would wear thin if a country did not also adhere to the treaty in practice. Invoking the difficulty of observing countries’ actual practices surely does not provide a complete response, particularly given the proximity of countries in the same region.

Signaling theory offers a more persuasive explanation for the lack of compliance that Hathaway observed. Countries in the same region often share political, cultural, linguistic, and other characteristics. At a minimum, they tend to have had extended histories with each other. As a result, they are more familiar with each other’s characteristics. Because of this familiarity, they have less need to rely on signals to estimate type.¹²⁰

On the other hand, there may be strong incentives to ratify a regional treaty. Failure to sign a regional treaty when the costs of signing are small suggests antagonism toward neighboring participants. Ratification prevents

¹¹⁷ Hathaway, *supra* note 1, at 1995; *see also id.* at 2000, 2004, 2016. This finding and my explanation of it aggregate experiences under different regional treaties. For findings for the individual treaties analyzed, *see id.* at 1995–97. For criticism of Hathaway’s underlying data which bears on the accuracy of her results, *see* DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS-LAW, POLICY AND PROCESS (3d ed. Supp. 2001), available at <http://www1.umn.edu/humanrts/intlhr/Chapter%2017%20rev.doc> (last visited Feb. 3, 2003).

¹¹⁸ Hathaway, *supra* note 2, at 2016–19; *see also id.* at 2004–09, 2020.

¹¹⁹ *See id.* at 2016, 2020.

¹²⁰ *Cf.* Farber, *supra* note 16, at 95 (noting that “signals are most needed by outsiders”). The signaling environment between countries that have long been allies may be similar to that of countries within the same region.

this inference. Ratification likewise prevents a country from being at a comparative disadvantage to ratifying neighbors with which it likely competes.¹²¹ The treaty also serves to distill the benefits enjoyed by the entrepreneurs of more universal signals by claiming ownership of those signals for the region. At the same time, the regional treaty, particularly if it has ostensible enforcement mechanisms, may send a signal to the rest of the world regarding the discount rates of those in the region.¹²² Accordingly, the treaty may have served its highest purposes, from the states' perspective, upon ratification, for at ratification it can accomplish all these tasks. Once these tasks have been accomplished, countries within the region have less incentive to send additional signals under the treaty, for these signals are less important among the familiar states within the region and the treaty itself has sent a signal to the rest of the world. Signaling theory thus helps to explain why one might find worse compliance than expected following ratification of regional treaties.

The dynamics of signaling likewise aid understanding of the march toward more demanding and law-like human rights regimes.¹²³ As explained, human rights compliance communicates private, nonverifiable information about a state's discount rate. Low-discount states can generally send compliance signals more cheaply than high-discount states. However, pooling results as the costs of signaling behaviors decrease, the incentives to incur those costs increase, or high-discount states acquire the ability to engage in signaling behaviors more cheaply through, for example, NGO efforts to increase states' capacities. In the face of pooling, lower discount states have an incentive to reach for more costly ways to distinguish themselves. Similarly, states press for more costly signals to secure the benefits of signal entrepreneurship. Thus, in the human rights arena, there is pressure to submit to increased monitoring and enforcement. A low-discount state that already tends to comply with the International Covenant on Civil and Political Rights might give in to that pressure by submitting to the additional enforcement mechanisms of the Optional Protocol.¹²⁴ Indeed,

¹²¹ Cf. Simmons, *supra* note 111, at 821, 824, 827, 832 (expecting "policy convergence, especially among countries whose venues are near substitutes for one another" and finding empirical evidence that an increase in the number of nations acceding to Article VIII of the IMF Articles of Agreement increases the likelihood of accession by an uncommitted nation).

¹²² The incentive to participate in the signal becomes greater as more nations within the region accede to the treaty, for then nonaccession sends a strong negative signal. See Beth A. Simmons, *Money and the Law: Why Comply with the Public International Law of Money?*, 25 YALE J. INT'L L. 323, 324–25 (2000); cf. Farber, *supra* note 16, at 96.

¹²³ Signaling theory does not provide a complete explanation of this process. Domestic preferences, for example, are undoubtedly a major catalyst in strengthening human rights regimes. For a discussion of various factors that may affect legalization, see Kahler, *supra* note 86, at 661–72, 680–82.

¹²⁴ See Hathaway, *supra* note 1, at 2014–15 (describing the enforcement mechanisms of the Optional Protocol, which, in practice, are fairly weak). Hathaway explains that the Protocol's enforcement mechanisms discourage countries that do not intend to comply from ratifying merely to obtain the expressive benefits of ratification. *Id.* at 2015. In the language of signaling theory, ratification of the Optional Protocol is too costly for high-discount states, but serves as a signal for low-discount states.

Hathaway found that states with better human rights practices are more likely to have accepted the Optional Protocol.¹²⁵ Each step toward increased monitoring and enforcement shows greater cooperativeness. As signals become enforceable, they come to resemble domestic law. This transition from signal to traditional law is facilitated by the fact that signals identify cooperative types. As a result, signaling behaviors partake of the normative quality of traditional law.¹²⁶

V. INSIGHTS FROM SIGNALING THEORY FOR PROMOTING HUMAN RIGHTS COMPLIANCE

Signaling theory not only helps to explain the international human rights phenomena discussed above, it provides valuable insights for promoting human rights compliance. At the outset, one might question whether signaling theory is compatible with a view toward advancing human rights. The most accurate response is that signaling theory is purely descriptive. The theory attempts to capture the way states actually behave and the realities, conscious or not, that motivate that behavior.¹²⁷ By modeling the self-interested way in which nations comply with or deviate from international human rights principles, signaling theory helps us to better understand the forces affecting human rights.

At the same time, nothing about signaling theory diminishes the value of human rights. While signals need not have a "necessary or intrinsic connection to the beliefs that they provoke,"¹²⁸ they may have such a connection. Indeed, human rights compliance is a signal that correlates well with the message it is theorized to convey. Adherence to human rights standards indicates that a nation is willing to incur the immediate costs of rights protection and is correspondingly more likely to forego opportunism in international interactions. Human rights compliance is thus associated with the positive qualities of restraint and cooperativeness.

Moreover, signaling theory recognizes that signals may both facilitate cooperation and produce external benefits.¹²⁹ For example, the signal of protecting free speech might both facilitate cooperation among nations with low discount rates and benefit society at large by advancing democracy and

¹²⁵ Hathaway, *supra* note 1, at 1987; *see also id.* at 1999–2000, 2004. However, Hathaway did not find a statistically significant relationship between ratification of the Optional Protocol and the community of nations' subsequent practices with regard to certain rights covered by the Protocol: namely, fair trials and civil liberties. *Id.* at 1994; *see also id.* at 1999–2000 & n.210.

¹²⁶ The difficulty scholars have encountered in determining the legal status of international human rights principles may have resulted, in part, from the fact that these principles are in transit along the signal-to-law continuum.

¹²⁷ *See* BAIRD ET AL., *supra* note 38, at 125 (arguing that game theory need not "recreate the exact process by which individuals make the decisions that they do" for game theory to be able to predict those decisions through the solution concepts it employs).

¹²⁸ POSNER, *supra* note 17, at 22–23.

¹²⁹ *Id.* at 33.

development and by validating individual autonomy and dignity. Thus, while human rights compliance need not assume normative significance in the context of signaling theory, signaling theory does not preclude the understanding that human rights have normative import and produce social benefit. As a matter of methodology, not values, the theory simply does not delve into these issues in its attempt to distill the signaling dynamic at work in the human rights arena.

Understanding signaling, however, reveals ways in which compliance might be increased. Assuming self-interested action as it does, signaling theory highlights that human rights compliance is best promoted by altering the payoffs a state receives through compliance. These payoffs can be changed in three prominent ways—by increasing capacity for compliance, by changing domestic preferences, and by publicizing state practices. These avenues are not new,¹³⁰ but their potential effects are illuminated by the signaling model.

Some states are constrained from complying by lack of capacity.¹³¹ These states may not, for example, possess the institutions or culture that facilitate rights protection.¹³² Efforts that cultivate capacity—training and education programs for judges, for example—make it less costly for these states to send compliance signals. Incidentally, some of these efforts might also increase the economic attractiveness of a state.¹³³ Economic opportu-

¹³⁰ Cf. Hathaway, *supra* note 1, at 2022–23 (advocating increased monitoring and publicity); *id.* at 2025 (arguing that the U.N. and regional bodies should work to increase countries' capacities for compliance).

¹³¹ Obiora, *supra* note 105, at 676; cf. McAdams, *supra* note 17, at 672–73 (noting that differences in wealth affect the amount of signaling players engage in). Indeed, in recognition of states' limited capacity, it is expressly recognized that social and economic rights are to be progressively realized. Maria Green, *What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement*, 23 HUM. RTS. Q. 1062, 1070 (2001).

¹³² It can be difficult to discern whether a nation lacks the ability to develop capacity on its own or lacks the restraint necessary to do so. McAdams explores a similarly difficult situation in which some good types have inconsistent discount rates. Some have a low discount rate when choosing between two future benefits, but a bias toward present benefits when choosing between a present benefit and a future benefit. That is, they are impulsive. If these inconsistent good types have a mechanism whereby they can commit themselves to choose future benefits, they can act the same as consistent good types who always prefer future benefits. However, if the opportunity to self-commit is itself unobservable, there is no way to distinguish inconsistent good types who lack the opportunity to self-commit from those who do not avail themselves of that opportunity. McAdams, *supra* note 17, at 655–61, 673. Similarly, if an observer cannot determine whether a nation lacks the resources to develop capacity or lacks the restraint necessary to do so, it is impossible to accurately determine the nation's type. Whatever the nation's type, capacity development reduces the cost of compliance and can thereby increase signaling behavior.

¹³³ See Farber, *supra* note 16, at 83, 91–92 (noting “the [apparent] current consensus among economists” of “the importance of an independent judiciary to development”); Michael J. Trebilcock, *What Makes Poor Countries Poor?: The Role of Institutional Capital in Economic Development*, in *THE LAW AND ECONOMICS OF DEVELOPMENT* 15, 40–44 (Edgardo Buscaglia et al. eds., 1997) (suggesting that developments in the legal system may facilitate economic growth, though noting a contrary view). But cf. *id.* at 20–25 (noting disagreement regarding whether democracy, with its attendant political rights, fosters economic growth); Posner, *supra* note 24, at 3 (recommending modest legal reform

nity attracts the type of cooperative endeavors that can provide an incentive to signal.

However, focusing exclusively on developing economic capacity can be problematic in the long run, for economic strength can serve both to encourage and excuse signaling. Economic development increases the cost of remaining an outlier and attracts countries that wish to enter cooperative arrangements. Depending on the size of the gains, these potential partners may require signaling. Once the potential gains from interaction reach a certain tipping point, however, countries may be willing to forego assurances of cooperation before engaging. As a result, signaling theory suggests that economic development may have conflicting effects on human rights compliance.¹³⁴ Contrary to the view that legal reform in developing countries should focus "on creating substantive and procedurally efficient rules of contract and property rights rather than on creating a first-class judiciary or an extensive system of civil liberties,"¹³⁵ then, signaling theory suggests that a disproportionate focus on economic development is unwise. Developing simultaneous capacity for compliance is also critical.

Yet states typically lack strong incentives to develop another country's capacity to comply. Economic gains provide some incentive. Creating a more democratic or loyal state might as well. But finding other strong incentives, outside domestic demands for promoting human rights, is an elusive task.¹³⁶ Consequently, groups interested in human rights compliance may not be able to rely on states to carry the responsibility of capacity building. NGOs may need to shoulder a large share of this burden by providing the necessary financial resources and personnel, or by generating domestic demand in wealthy countries, for such efforts.

Changing domestic demands can have a profound impact on compliance. One way to achieve this change is to publicize not simply violations of human rights, but also the type of cost-benefit analysis that signaling theory suggests states conduct in determining whether to comply. Citizens

initially "[g]iven the risk that too heavy an initial investment in legal reform could deprive the productive economy of necessary resources and thus stifle legal and economic reforms"). Relatedly, the observance of certain human rights, such as equal opportunity for ethnic minorities, may directly affect the economic capacity of a country. As a result, compliance with these rights may be a particularly relevant signal.

¹³⁴ Economic growth may have conflicting effects on compliance for other reasons as well. See Hathaway, *supra* note 1, at 1990 & n.187 (citing sources for the conflicting propositions that economic growth may increase noncompliance by destabilizing a country, thereby increasing repression, or may minimize noncompliance by pacifying those who might otherwise rebel and face repression). Cf. Trebilcock, *supra* note 133, at 21, 23 (identifying empirical and theoretical support for the idea that economic growth results in greater pressure for democratization).

¹³⁵ Posner, *supra* note 24, at 9.

¹³⁶ See Ronald B. Mitchell, *Compliance with International Treaties: Lessons from Intentional Oil Pollution*, ENV'T, May 1995, at 10, 38 (recognizing that programs designed to build capacity for compliance are unlikely to succeed due to "disputes over the causes of non-compliance and the reluctance of developed countries to provide funding").

who believe rights have unique or uncompromising value will likely balk at this cost-benefit approach (just as human rights scholars would justifiably balk at the signaling theory outlined here if it were normative rather than descriptive).¹³⁷ Even those who will tolerate a cost-benefit approach may put a large premium on rights. These citizens may then pressure their governments to place greater value on human rights compliance at home and abroad. They have an incentive to do so to protect the value accorded their own rights.¹³⁸

Domestic pressures can be particularly effective if translated into legislation that requires the government to condition its interaction with other nations on human rights compliance.¹³⁹ Such legislation in effect singles out human rights compliance from among many possible signals and makes it a necessary signal. The legislation prevents the government from basing the decision to engage nonsignaling states on a case-by-case cost-benefit analysis and increases the costs of noncompliance for potential cooperative partners.

Gathering and publicizing information about states' compliance with human rights can also serve to change the payoffs of signaling. Publication of nations' compliance increases the reach and thereby the benefit of the compliance signal, increasing the incentive to engage in the signal. Conversely, increased information about human rights abuses costs the abusing state as it reveals that the state is unrestrained.¹⁴⁰ As a result, whether an international human rights agreement has an effective reporting requirement that increases publicity of states' practices may be more important for promoting compliance than whether the agreement's guarantees are considered legally binding.

Regardless whether an agreement imposes a reporting requirement, courts or other bodies evaluating state actions can increase publicity by citing pertinent human rights instruments, whether binding or hortatory, to advertise conformance with or divergence from human rights principles.¹⁴¹ Developing more precise human rights rules can simplify the process of identifying and publicizing compliance and deviation.¹⁴² Precise rules also

¹³⁷ See Farber, *supra* note 16, at 84 (noting that "many people would reject on moral grounds the view that protection of human rights should bow to economic considerations"); cf. POSNER, *supra* note 17, at 193–94 (noting the debate regarding whether incommensurability reflects "a different kind of value" or an infinite degree of value).

¹³⁸ Cf. Kahler, *supra* note 86, at 669 (noting that "groups—and governments themselves—choose legalized international institutions to bind governments to particular domestic policies").

¹³⁹ But cf. Horton & Sellier, *supra* note 45 (illustrating the ineffectiveness of legislation that conditions continued aid on executive certification of human rights compliance). Ongoing monitoring may be necessary to ensure that the partner country continues to engage in signaling behavior even after interaction has begun. See *id.* at 849–51.

¹⁴⁰ See Guzman, *supra* note 1, at 1862–63 (recognizing that the reputational effects of noncompliance depend on the extent to which the violation is known).

¹⁴¹ Courts might also act as signal entrepreneurs by developing more stringent human rights standards.

¹⁴² See Guzman, *supra* note 1, at 1857; cf. Finnemore & Sikkink, *supra* note 14, at 900 (Clarifying a norm contributes to its acceptance.).

serve to minimize opportunities to comply only with the least restrictive requirements of broad concepts of rights.¹⁴³

Signaling theory suggests a final avenue for promoting compliance: universalizing human rights principles.¹⁴⁴ The theory highlights the difficulty that arises when signaling behaviors are associated with a subset of states. Other states may gain advantage by resisting the signals. To promote human rights compliance among these states, then, it is not enough that powerful nations endorse the signaling behaviors. Instead, the signals should be perceived as neutral and universal.¹⁴⁵ A state might still obtain advantage by rejecting these signals, but it will risk greater costs by spurning the wider international community. Similarly, a state will likely be less successful in diverting domestic attention away from failure to engage in the signaling behaviors to opposition toward the signaling states. Domestic audiences may, as a result, feel more inclined to insist on the signaling behaviors. Internationalization of human rights principles may thus serve to increase global compliance.

CONCLUSION

The international human rights regime has grown significantly since World War II. Nonetheless, for all the theorizing that has been done in recent years about compliance with international law, a component of the compliance equation for human rights has gone underappreciated. Signaling theory captures that component: the attempt by states to communicate and gather information about each other through the costly act of human rights compliance. Understanding this dynamic contributes to our understanding of when nations are likely to comply with human rights principles and how compliance may be increased. Signaling theory is thus an important addition to the developing scholarship on compliance with international law.

¹⁴³ See AN-NA'IM, *supra* note 58, at 431; cf. Guzman, *supra* note 1, at 1876 ("Because CIL's content is uncertain, states can often claim to have complied even when they have ignored the content of CIL."); Schaefer, *supra* note 66, at 460 (noting that "a well-specified contract . . . discourages defection because rationalization or assertions of fanciful exceptions are less likely").

¹⁴⁴ The feasibility and overall desirability of universalization are difficult questions that lie beyond the scope of this Essay. See, e.g., AN-NA'IM, *supra* note 58, at 429–30; Gustavo Esteva & Madhu Suri Prakash, *Human Rights: The Trojan Horse of Recolonization?*, in GRASSROOTS AND POST-MODERNISM: REMAKING THE SOIL OF CULTURES 110, 110–46 (1998); Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT'L L. REV. 391 (2001); Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT'L L. 527 (2001); Vivian Groszold Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657, 667 (1998); Obiora, *supra* note 105, at 669–70, 676–79; van der Vyver, *supra* note 51, at 790; see also LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS (4th ed. 2001) (citing sources). Suffice it to recognize the drag on compliance that occurs when signaling behaviors are perceived as ideological rather than universal.

¹⁴⁵ See AN-NA'IM, *supra* note 58, at 431. For thoughts on how universalization might be achieved, see *id.* at 431–33.